Supreme Court, U. S.
FILED
FEB 6 1976
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In The

Supreme Court of the United States

October Term, 1975

No. 75-1117

EDWARD MISHKIN and WHOLESALE BOOK CORPORATION,

Petitioners,

vs.

THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION: FIRST DEPARTMENT

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TABLE OF CONTENTS

Page

Jurisdiction 2

Questions Presented 2

Constitutional and Statutory Provisions Involved 2

Resume of the Facts 3

Argument on the Law:

I. The search warrant and supporting affidavit that merely described the books and movies to be seized as "obscene," did not describe them with sufficient particularity, thereby depriving petitioners of their constitutional rights secured by the First, Fourth and Fourteenth Amendments. 8

II. A massive seizure of 103,000 books and movies, without a prior evidentiary hearing, deprived petitioners of their constitutional rights secured by the First, Fourth and Fourteenth Amendments. .. 13

III. Surrender by petitioners of their right to an adversary hearing on the propriety of a mass seizure of books and movies in consideration of the prosecutor's promise not to request excessive bail was inherently coercive and violative of due process of law. 17

Contents

Page

IV. It was an abuse of discretion and violative of due process of law for the court to deny petitioners' application to withdraw their pleas of guilty. 20

Reasons the Petition Should Be Granted 23

TABLE OF CITATIONS

Cases Cited:

Freedman v. Maryland, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965) 16

Heller v. New York, 413 U.S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973) 16, 17

Henry v. Mississippi, 379 U.S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965) 15

Marcus v. Search Warrants of Property, 367 U.S. 717, S. Ct. 1708, 6 L. Ed. 2d 1127 (1961) 16, 17

People v. Blakely, 34 N.Y.S. 311, 357 N.Y.S. 2d 459 (1974) 19

People v. Drone, 40 A.D. 2d 875, 338 N.Y.S. 2d 119 (2d Dept. 1972) 22

People v. Hughes, 31 A.D.2d 235, 296 N.Y.S.2d 671 (4th Dept. 1969) 12

Contents

Page

People v. Marcus, 69 Misc.2d 600, 330 N.Y.S.2d 638 (Seneca County Ct. 1972) 12

People v. McKennion, 27 N.Y.2d 671, 313 N.Y.S.2d 876, 261 N.E.2d 910 (1970) 21

People v. Nettles, 30 N.Y.2d 841, 335 N.Y.S.2d 83 (1972) 22

People v. Nixon, 21 N.Y.2d 338, 237 N.Y.S.2d 659, 234 N.E. 2d 687 (1967) 21

People v. Rainey, 14 N.Y.2d 37, 248 N.Y.S.2d, 197 N.E.2d 527 (1964) 11

People v. Rothenberg, 20 N.Y.2d 35, 281 N.Y.S.2d 316, 228 N.E.2d 379 (1967) 10

Rage Books v. Leary, 301 F. Supp. 546 (S.D.N.Y. 1969) 5

Quantity of Books v. Kansas, 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (1964) 6, 14, 16, 17

Statutes Cited:

28 U.S.C. §1253 2

Penal Law, Section 235.00 9

Contents

Page

Criminal Procedure Law, Section 220.60 20

United States Constitution Cited:

First Amendment 2, 4, 8, 9, 11, 12, 13, 15, 16, 18, 20, 23

Fourth Amendment 2, 3, 4, 8, 9, 10, 11, 12, 13, 18, 23

Fourteenth Amendment..... 2, 4, 8, 13, 18

APPENDIX

Appendix A — Decision of Appellate Division, First Department 1a

Appendix B — New York Court of Appeals Denial of Leave to Appeal 3a

In The

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION: FIRST DEPARTMENT

Petitioners petition this Court for a Writ of Certiorari to the Appellate Division in the First Department, which, on the 30th day of September, 1975, affirmed, without opinion, the judgment of conviction entered against them on the 2nd day of April, 1974, sentencing both petitioners, on their pleas of guilty to fines.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1253.

QUESTIONS PRESENTED

1. Whether a search warrant and supporting affidavit that merely described books and movies to be seized as "obscene," failed to describe them with sufficient particularity, thereby depriving petitioners of their constitutional rights secured by the First, Fourth and Fourteenth Amendments?

2. Whether a massive seizure of 103,000 books and movies without a prior evidentiary hearing, deprived petitioners of their constitutional rights secured by the First, Fourth, and Fourteenth Amendments?

3. Whether the surrender by petitioners of their right to a post-seizure adversary hearing on the propriety of a mass seizure of books and movies in consideration of the prosecutor's promise not to request excessive bail was inherently coercive and violative of the Fourteenth Amendment?

4. Whether it was an abuse of discretion and violative of the Fourteenth Amendment for the trial court to deny petitioners' application to withdraw their pleas of guity?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First, Fourth and Fourteenth Amendments are involved herein.

RESUME OF THE FACTS

On the 12th day of January, 1972, a search warrant was issued to Detective Donald Gray, authorizing seizure of "obscene material" on the premises occupied by petitioner Wholesale Book Corp. The affidavit of Detective Gray made the representation that petitioners were in possession of an obscene movie, "Sex Nurse." It also set forth that "on December 29, 1971, New York City Criminal Court Judge Robert Haft issued a search warrant for the film 'Sex Nurse' having held said movie to be obscene," without, however, particularizing the basis for Judge Haft's conclusion. The affidavit also recited that on the 21st day of December, 1971, Ralph Borello sold to a police officer "Sex Nurse"; that on the 30th day of December, 1971, Borello offered to sell five hundred rolls of "Sex Nurse" to Patrolman Apu for three thousand dollars and that on that date "a John Doe" delivered the film to Borello and Apu in a 1971 Pontiac, bearing license number 077-593, which car is registered to petitioner Wholesale Book Corp.

On the 28th day of February, 1972, the search warrant was executed upon the premises of petitioner Wholesale Book Corp. and a seizure was made of 100,000 books and 3,000 rolls of film. A judge accompanied the police officers who carried out the raid. Petitioner Mishkin was arrested. Petitioners were indicted on fifty-six counts of obscenity in the first degree for possession of three hundred twenty-four copies of fifty-six books and movies.

Petitioners made an omnibus motion for pre-trial relief, which included an application to suppress the evidence seized as violative of the Fourth Amendment protection against unreasonable searches and seizures.

The supporting affidavit of Herbert S. Kassner, Esq., who then represented petitioner, set forth that

> "after obtaining a warrant for the search and seizure from defendant's place of business of certain specified allegedly obscene film, a Judge accompanied by police officers and John Jacobs, an Assistant District Attorney, invaded defendants' premises and conducted a general exploratory search thereof, including. in said search, the opening and scrutinizing of books (not film) for which the inspecting Judge issued specific search and seizure warrants on the spot . . . .After seizing approximately 100,000 books and 3,000 films, presumptively protected by the First Amendment, samples of which had been searched and scrutinized by the Judge on the spot, the Assistant District Attorney, dissatisfied with the speed with which the Judge had scrutinized the books and issued the warrants, distraught by the thought of leaving any literature unsearched and unseized, and determined to make this seizure the most widespread and thoroughgoing in the history of American censorship and book-burning, threatened the defendants' attorney with a request for $25,000 bail unless the attorney, in behalf of his client, waived defendants' First, Fourth and Fourteenth Amendment rights and consented to the seizure, without prior adversary hearing, or even prior judicial scrutiny, of all of

> the adult literature in the warehouse. As an inducement to sweeten the extortionate demand, based on the threat of preventive detention, the District Attorney 'promised' to request only $5,000 bail, if defendants waived their constitutional rights as aforesaid . . . . Defendant denies having been advised of this deal . . . ."

Assistant District Attorney John H. Jacobs submitted his affidavit in opposition to petitioners' motions. He then submitted a supplemental affidavit, reciting that

> "police officers execut d the above warrant and in searching for the a' ove film came upon one of the largest deposits of pornography in this country. The Police Department immediately contacted your deponent who arranged for Judge Edward Pincus to accompany your deponent to the above premises. Judge Pincus spent several hours examining the material. Judge Pincus authorized the seizure of six copies of certain items pursuant to *Rage Books v. Leary*, 301 F. Supp. 546 (S.D.N.Y. 1969) . . . .An attorney, Loren D. Gardner, arrived while Judge Pincus was examining the material and conferred with the defendant Mishkin who had been placed under arrest. Both Mr. Mishkin and Mr. Gardner were desirous of knowing whether the considerable amount of material found was going to be seized. Your deponent informed Mr. Mishkin and Mr. Gardner that only six copies of

> each film and magazines were going to be seized, that $25,000.00 bail was going to be asked of the defendant Mishkin (based on several prior convictions and amount of material), and that the prosecution would be ready to proceed with an adversary hearing the next morning to seize the rest of the obscene material based on *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964) . . . .Mr. Gardner then suggested that he would waive an adversary hearing if your deponent would consider making a lower bail application. Your deponent agreed and the next day bail was set at $5,000.00 and an adversary hearing was waived on the record. After the hearing was waived, the material was seized that Judge Pincus had examined."

Justice Harold Birns *did not* pass on the motion for a hearing, but rather referred it to the trial part.

On April 3, 1973, petitioners pleaded "guilty" to illegal possession of obscene material, as charged in the first count of the indictment, to cover all counts, petitioner Mishkin pleading guilty to Obscenity in the Second Degree, as a misdemeanor, and petitioner Wholesale Book Corporation to Obscenity in the First Degree, as a felony.

Petitioners duly moved to withdraw their pleas of guilty, citing *inter alia,* that they are entitled to "a hearing to determine the admissibility of certain evidence unlawfully seized including evidence seized in a raid on defendants' premises known as

Wholesale Book Corporation, consisting of corporate and personal books and records, and approximately 100,000 books and 3,000 films presumptively protected under the First Amendment." In his affidavit in opposition, Assistant District Attorney John H. Jacobs informed the court that "other grounds alleged by defendants (including illegal search and seizure) have been previously determined by Judge Birns." However, the record reveals that Judge Birns *did not* adjudicate the legality of the search and seizure, but rather expressly referred it to the trial court. Justice Culkin refused to allow the guilty plea to be withdrawn, and so deprived petitioners of a hearing to adjudicate the legality of the mass seizure that unquestionably took place in this case.

On the 2nd day of April, 1974, sentence was pronounced — a one thousand dollar fine for appellant Mishkin or one year in the New York City Penitentiary, and a ten thousand dollar fine for the corporate appellant. Notice of appeal was duly served and filed. Petitioner Mishkin paid his fine, rather than risk incarceration, while a stay of execution was issued on the fine imposed upon the corporation, pending appeal.

ARGUMENT ON THE LAW

I.

The search warrant and supporting affidavit that merely described the books and movies to be seized as "obscene," did not describe them with sufficient particularity, thereby depriving petitioners of their constitutional rights secured by the First, Fourth and Fourteenth Amendments.

On January 12, 1972, a warrant was issued authorizing seizure of "obscene" material, based on allegations that petitioners were in possession of an obscene movie, "Sex Nurse." This warrant was issued by Criminal Court Judge Pincus, on the affidavit of Detective Donald Gray, which recited that "on December 29, 1971, Judge Robert Haft issued a search warrant for the film 'Sex Nurse,' having held said movie to be obscene." Also, a copy of the papers submitted to Judge Haft *were not* included with those submitted to Judge Pincus, who issued the warrant here under challenge, and so, there was no showing of the basis for the conclusion of Judge Haft.

Under authority of the warrant issued by Judge Pincus, a search was made of the premises of petitioners and some 100,000 books and 3,000 movies, consisting of fifty-six titles, were seized. Petitioners were indicted for illegal possession of each of the fifty-six titles, the indictment charging illegal possession of six of each, for a total of three hundred thirty-six items, although the seizure was vastly more extensive, 103,000 books and movies having been gathered up in the raid.

Petitioners made a motion to suppress the evidence seized on grounds that the procedures violated the Fourth Amendment. The decision of the court, referred the application to the trial judge. This decision was clearly erroneous, in that a reading of the search warrant, as supplemented by Detective Gray's affidavit, discloses that it was insufficient as a matter of law, failing to meet minimal Fourth Amendment standards. There was no need for a hearing on this matter in that the search warrant, even as supplemented by Detective Gray's affidavit, was fatally defective. No judge can possibly make an independent judgment that there is probable cause for the issuance of a search warrant, where the only description of the offensive material submitted to him by the police officer applicant is that it is "obscene." Yet, in the case at bar, Detective Gray, in his affidavit, fails to show *any* particulars that might lead a detached judicial officer to conclude that the material to be seized was not protected by the First Amendment, but, was, in fact, obscene.

The New York State legislative definition of obscenity can be found in Section 235.00 of the Penal Law:

> "1. 'Obscene.' Any material or performance is 'obscene' if (a) considered as a whole, its predominant appeal is to prurient, shameful or morbid interest in nudity, sex, excretion, sadism or masochism, and (b) it goes substantially beyond customary limits of candor in describing or representing such matters and (c) it is utterly without redeeming social values."

There is nothing in the detective's affidavit that could possibly move a judge to conclude that "Sex Nurse," the movie to be seized, was "obscene" within the legislative definition. The fact that the judge accompanied the detective who conducted the raid does not cure the defective warrant, in that a warrant is good or bad at the time of issuance and what subsequently turns up will not cure one that is defective. Since "Sex Nurse" was merely described by Detective Gray as "obscene" without any particularization, the warrant was defective, and any seizure made under color of it, is offensive to the Fourth Amendment. Indeed, it was Detective Gray who made the decision that the materials under fire were offensive, not the judicial officer who issued the warrant, since there just was not sufficient particularization for a judicial officer to reach such conclusion. As for the representation that Judge Haft had already ruled this film to be obscene on a prior *ex parte* application for a search of some undisclosed premises, this is not curative. There is nothing in the record to disclose the basis for the conclusion by Judge Haft. Surely, petitioners are not bound by it, when there is no showing that they were parties to the prior litigation before him.

In *People v. Rothenberg*, 20 N.Y. 2d 35, 281 N.Y.S. 2d 316, 228 N.E. 2d 379 (1967), the New York Court of Appeals was faced with the type of conclusory language that is under challenge in the case at bar. The court upset a conviction (*even though it resulted from a plea of guilty*), writing:

> "The search warrant, in terms, authorized a search on appellant's premises for and a seizure of 'obscene, indecent and hard core pornographic pictures, photographs and motion picture films.'

> This language does not save the warrant from the fate that befell the search warrant . . . which purported to authorize a search for 'indecent books and material.' It is not in compliance with the requirement of the Fourth Amendment to the United States Constitution that the warrant shall particularly describe the 'persons or things to be seized.' The basic defect is that the language delegates to the police officer executing it the function of determining whether the material is obscene."

In less sensitive areas than the First Amendment, search warrants have been condemned, where specificity requirements have not been met. In *People v. Rainey*, 14 N.Y. 2d 37, 248 N.Y.S. 2d, 197 N.E. 2d 527 (1964), a search warrant authorizing a search of an entire house, consisting of two apartments, instead of limiting itself to the one occupied by the defendant, was declared to be constitutionally offensive:

> "It is to avoid 'a blanket search' with its obvious interference with the innocent that the State and Federal Constitutions provide that 'no warrants shall issue, but upon probable cause . . . and particularly describing the place to be searched, and the persons or things to be seized . . . .' The Federal Courts have consistently held that in the absence of circumstances sufficient to satisfy fundamental requirements, a search warrant so issued is void. The purpose of the requirement for particularity of description of the place and

> the person and things to be seized is to provide adequate means of identification which is not met by a generality . . . ."

There is nothing in Detective Gray's affidavit to indicate why he found the film in question to be obscene and nothing to enable any judge to make an independent judgment that there was probable cause to believe the movie to be offensive.

In *People v. Hughes*, 31 A.D.2d 235, 296 N.Y.S.2d 671 (4th Dept. 1969), a warrant couched in identical language as the one here under attack was declared to be constitutionally offensive by a court that wrote:

> "The warrant must particularly describe the property to be seized. There may arise factual situations where such particularization is not in the warrant but it is possible from all the proof to conclude that the issuing magistrate made a judicial determination of obscenity before signing the warrant. Such is not this case."

Such is not this case, either. Both warrants authorized the same type of seizure — "obscene" material — without any factual demonstration by the affiant that the offensive material was, in fact, outside the shelter of First Amendment protection. *People v. Marcus*, 69 Misc. 2d 600, 330 N.Y.S.2d 638 (Seneca County Ct., 1972) is a case where the warrant adequately met minimal First and Fourth Amendment requirements:

> "The search warrant specifically sets forth what material should be seized in relation to specific

> acts of sexual conduct and directs any police officer, who having a grasp of practicality and reality and eyesight, using these descriptions as guidelines, to seize what certainly can be observed in his perusal of the various magazines. It does not delegate an interpretation to the police officer which has been a turning point in many decisions which have been rendered heretofore."

There was absolutely no need for a hearing in the case at bar for the court to conclude that the search warrant was defective. The supporting affidavit of the police officer set forth no facts to reach his conclusion that the materials he petitioned for leave to seize were, in fact, obscene and therefore, the warrant and supporting affidavit were constitutionally defective, thereby tainting the seizure made under color of them. The court erred in failing to suppress the evidence.

II.

A massive seizure of 103,000 books and movies, without a prior evidentiary hearing, deprived petitioners of their constitutional rights secured by the First, Fourth and Fourteenth Amendments.

The Assistant District Attorney in charge of the prosecution, John H. Jacobs, made himself a witness to the seizure. The circumstances are explained in his supplemental affidavit in opposition to petitioners' application for pre-trial relief, in which counsel for petitioners complained of the massive seizure of 103,000 books and movies, without a prior adversary hearing:

"Police officers executed the above warrant and in searching for the above film came upon one of the largest deposits of pornography in this Country. The Police Department immediately contacted your deponent who arranged for Judge Edward Pincus to accompany your deponent to the above premises. Judge Pincus spent several hours examining the material. Judge Pincus authorized the seizure of six copies of certain items. . . . An attorney, Loren D. Gardner, arrived while Judge Pincus was examining the material and conferred with the defendant Mishkin who had been placed under arrest. Both Mr. Mishkin and Mr. Gardner were desirous of knowing whether the considerable amount of material found was going to be seized. Your deponent informed Mr. Mishkin and Mr. Gardner that only six copies of each film and magazine were going to be seized, that $25,000 bail was going to be asked on the defendant Mishkin (based on several prior convictions and amount of material), and that the prosecution would be ready to proceed with an adversary hearing the next morning to seize the rest of the obscene material based on *A Quantity of Books v. Kansas,* 378 US. 205 (1964) . . . Mr. Gardner then suggested that he would waive an adversary hearing if your deponent would consider making a lower bail application. Your deponent agreed and the next day bail was set at $5,000 and an adversary hearing was waived on the record.

After the hearing was waived the material was seized that Judge Pincus had examined."

Without discussing whether or not due process of law is offended by a "deal" with a prosecutor for a defendant to surrender a constitutional right in return for his promise not to request excessive bail — which will be discussed in the next point — a hearing was unnecessary to establish that a massive 103,000 book and movie seizure had taken place in this case, without a prior adversary hearing. Mr. Jacobs, the Assistant District Attorney in charge of the prosecution, witnessed it and conceded it.

Of course, the presence of Judge Pincus to examine the books seized was not an adversary hearing. He certainly was not sitting in the warehouse of petitioners as a detached magistrate. He was there as a member of the prosecutorial team, not to hear evidence and assure opportunity for cross-examination.

It is submitted that the right to a prior adversary hearing, where a massive seizure of First Amendment materials is made, is non-waivable. There is a strong presumption against waiver of a constitutional right and the law will not presume a voluntary waiver, unless strategy can be served by doing it. *Henry v. Mississippi,* 379 U.S. 443, 85 S. Ct. 564, 13 L.Ed. 2d 408 (1965). A waiver is far distant from voluntary when made in response to a prosecutorial agreement not to apply for excessive bail, as in the case at bar. But beyond that, a waiver could serve no possible strategy. Given the undisputed facts, the absence of a prior hearing in this case rendered the seizure unconstitutional and destroyed the efficacy of the resulting indictment. No

strategy could possibly be served by waiving the right to such challenge. Such waiver could only spell the relinquishment of a constitutional right under duress.

Since a massive seizure may have the tendency to put a defendant out of business and limit the public's right to read materials that are presumptively protected by the First Amendment, it must be preceded by an adversary hearing. This was held in *Marcus v. Search Warrants of Property*, 367 U.S. 717, S. Ct. 1708, 6 L.Ed. 2d 1127 (1961) and *Quantity of Books v. Kansas*, 378 U.S. 205, 84 S. Ct. 1723, 12 L.Ed. 2d 809 (1964) and the Supreme Court has never retreated an inch from this proposition.

"Because only a judicial determination in an adversary proceeding ensures the necessary sensitivity to freedom of expression, only a procedure requiring a judicial determination suffices to impose a final restraint." *Freedman v. Maryland*, 380 U.S. 51, 85 S. Ct. 734, 13 L. Ed. 2d 649 (1965). A "final restraint" is a massive seizure aiming more at putting the defendant out of business than gathering the limited quantity of evidence necessary for a criminal prosecution. It is for this reason that a prior adversary hearing is a *sine qua non* to such action and nothing short of that will do.

In *Heller v. New York*, 413 U.S. 483, 93 S. Ct. 2789, 37 L.Ed. 2d 745 (1973) the Supreme Court approved a procedure whereby an adversary hearing would be held within forty-eight hours of the seizure of a single reel of film for evidence, but was quick to distinguish that such relaxed procedure would not suffice where a massive seizure is involved.

> "Courts will scrutinize any large scale seizure of books, films or other materials presumptively protected under the First Amendment, to be certain that the requirements (of a prior adversary hearing) of *Quantity of Books* and *Marcus* are fully met. . . . But seizing films to destroy them or to block their distribution or exhibition is a very different matter from seizing a single copy of a film for the bona fide purpose of preserving it as evidence in a criminal proceeding."

Heller delineated the limited deviation permissible from the rule that a seizure of material presumptively protected by the First Amendment must be preceded by an adversary hearing. It does not encompass seizures, where they are massive, and so, the case at bar, does not fall within the exception.

III.

Surrender by petitioners of their right to an adversary hearing on the propriety of a mass seizure of books and movies in consideration of the prosecutor's promise not to request excessive bail was inherently coercive and violative of due process of law.

The affidavit of Herbert S. Kassner, Esq., then attorney for petitioners, recites a transaction that was inherently coercive:

> "After obtaining a warrant for the search and seizure from defendants' place of business of

certain specified allegedly obscene film, a judge accompanied by police officers and John Jacobs, an Assistant District Attorney, invaded defendants' premises and conducted a general exploratory search thereof, including in said search the opening and scrutinizing of books (not film) for which the inspecting judge issued search and seizure warrants on the spot. . . . After seizing approximately 100,000 books and 3,000 films presumptively protected by the First Amendment, samples of which had been searched and scrutinized by the Judge on the spot, the Assistant District Attorney, dissatisfied with the speed with which the Judge had scrutinized the books and issued the warrants, distraught by the thought of leaving any literature unsearched and unseized, and determined to make this seizure the most widespread and thoroughgoing in the history of American censorship and book-burning, threatened the Defendant's attorney with a request for $25,000.000 bail unless the attorney, in behalf of his client, waived Defendants' First, Fourth and Fourteenth Amendment rights and consented to the seizure, *without prior adversary hearing or even prior judicial scrutiny of all of the adult literature in the warehouse*. As an inducement to sweeten the extortionate demand, based on the threat of preventive detention, the District Attorney promised to request only $5,000.00 bail if Defendants waived their constitutional rights. . . . Defendant denies having been advised of this deal. . . ."

Assistant District Attorney Jacobs in his supplementary affidavit agreed that a deal was made for petitioners to waive their right to a prior adversary hearing on the propriety of the search, but he claims that petitioners' lawyer approached him with the offer, rather than he being the initiator. No hearing has been conducted as to this feature, and so, the issue as to who suggested the unconscionable deal remains unresolved. The point is, however, that no matter who suggested such deal, it was inherently coercive for a defendant to have to bargain away a constitutional right, so that a prosecutor would not request excessive bail for him.

Recently, the New York Court of Appeals was faced with a similar situation. A defendant was afforded a plea to a lesser crime in consideration of surrendering his right to move to dismiss the indictment for denial of a speedy trial. The Court wrote:

> "For a variety of reasons, a prosecutor must not make the right to a speedy trial an item of barter in a plea bargaining situation. . . . We conclude that the nature of the speedy trial guarantee renders such a condition inherently coercive in a plea bargaining situation and that the plea so conditioned must be vacated." *People v. Blakely*, 34 N.Y.2d 311, 357 N.Y.S. 2d 459 (1974).

For the same "variety of reasons, a prosecutor must not make the right to" an adversary hearing to determine the legality of a massive seizure "an item of barter" in a bail fixation "situation." Moreover, it is self-evident that this bartering away

of the right to prior adversary hearing, might well have had its impact upon the plea bargaining negotiations in the case at bar. For this reason alone, the proceedings have been tainted and the judgment of conviction must be vacated.

IV.

It was an abuse of discretion and violative of due process of law for the court to deny petitioners' application to withdraw their pleas of guilty.

Subsequent to entry of their pleas of guilty and before sentence, petitioners duly made written application to withdraw their guilty pleas and cited as grounds, the illegality of the massive seizure of materials protected by the First Amendment under color of a defective search warrant.

Section 220.60, Criminal Procedure Law, provides:

> "4. At any time before the imposition of sentence, the court in its discretion may permit a defendant who has entered a plea of guilty to the entire indictment or to part of the indictment to withdraw such plea, and in such event, the entire indictment, as it existed at the time of the plea of guilty, is restored."

> "Where after a plea of guilty has been entered, and before sentence, defendant states to the Court he is not guilty, or that he believes he is not guilty, the rule has developed that the Court

> should not, except in extraordinary circumstances, then impose sentence, but either grant an application to allow the plea to be withdrawn, or conduct a hearing to d termine whether the application has merit." *People v. McKennion,* 27 N.Y.2d 671, 313 N.Y.S.2d 876, 261 N.E.2d 910 (1970).

In the moving papers of petitioners, the claim was made of innocence, as well as the illegality of the seizure of evidence to obtain the indictment, which is tantamount to such claim. One against whom there is no evidence, is, in effect, innocent, since he has not been proven guilty. At sentencing, counsel pointed out petitioner Mishkin's claim of innocence:

> "Mr. Milavetz: And the record should indicate even today he doesn't admit he is guilty.
>
> The Court: He — A plea can be taken even when the denial of the fact can be had, that is a denial by the defendant."

The court below was in error in ruling that it had discretion to deny the application to withdraw the plea in face of a claim of innocence, given an absence of extraordinary circumstances.

In *People v. Nixon,* 21 N.Y.2d 338, 237 N.Y.S.2d 659, 234 N.E. 2d 687 (1967), the court, concerning an application by a defendant to withdraw a plea of guilty prior to sentencing on grounds that there were "technical objections," (such as the illegality of the massive seizure in the case at bar) available to

him, "the Court should have conducted an inquiry or permitted defendant summarily to withdraw his plea of guilty," a procedure that was *not* followed in the case at bar. The court went on to write:

> "It is not tolerable for the State to punish its members over protestations of innocence if there is doubt as to their guilt, or if they be unaware of their rights, or if they have not had opportunity to make a voluntary and rational decision with proper advice in pleading guilty."

A plea may properly be withdrawn where "there was a mutual mistake of fact and law in the giving and acceptance of defendant's plea." *People v. Nettles,* 30 N.Y.2d 841, 335 N.Y.S.2d 83 (1972). Certainly, the complexity of the Fourth and First Amendment rights indigenous to the seizure in the case at bar, allow for a respectable claim of mutual mistake as to the rights of petitioners.

Nor is there any claim of prejudice to the prosecution that a trial had been commenced and veniremen had been impaneled, prior to the rendition of the plea. Under such circumstances, a plea will not lightly be permitted to be withdrawn, since the prosecution can show prejudice by the discharge of the jury panel. *People v. Drone,* 40 A.D.2d 875, 338 N.Y.S.2d 119 (2nd Dept. 1972). In the case at bar, the prosecution was not put through such inconvenience. Given that petitioners made the claim that the materials were not obscene in a First Amendment sense, and that they were illegally seized, a proper exercise of judicial discretion required that petitioners be granted leave to withdraw their pleas of guilty and again face the indictment.

REASONS THE PETITION SHOULD BE GRANTED

The issues presented by this case are far reaching, in respect to mass seizures of printed material, without a hearing, and the First and Fourth Amendment implications thereof; in addition, there is the issue whether the right to reasonable bail can be bargained for by relinquishment of a different constitutional right, to wit, the right to an adversary hearing where books and movies are seized and whether such relinquishment of the constitutional right is effective.

Respectfully submitted,

s/ Samuel Bierman,
Attorney for Petitioners

APPENDIX A — DECISION OF APPELLATE DIVISION, FIRST DEPARTMENT

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on September 30, 1975.

Present — Hon.
Harold A. Stevens, Presiding Justice
Theodore R. Kupferman
Francis T. Murphy, Jr.
George Tilzer
Emilio Nunez, Justices.

The People of the State of New York,

Respondent,

-against-

Edward Mishkin

Defendant-Appellant.

Order of Affirmance on Appeal from Judgment

1025

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court,

Appendix A — Decision of Appellate Division, First Department

New York County (Culkin, J.) rendered on April 2, 1974, convicting him of the crime of obscenity in the second degree, and said appeal having been argued by Mr. Raphael P. Koenig of counsel for the appellant, and by Mr. Robert K. Hood of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously order and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed.

ENTER:

s/ Hyman W. Gamso
Clerk.

Counsel for appellant is referred to § 606.5. Rules of the Appellate Division, First Department.

APPENDIX B — NEW YORK COURT OF APPEALS DENIAL OF LEAVE TO APPEAL

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. CHARLES D. BREITEL, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

EDWARD MISHKIN and WHOLESALE BOOK CORPORATION,

Defendant-Appellant.

I, CHARLES D. BREITEL, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at New York, New York
November 3, 1975

s/ Charles D. Breitel
Chief Judge

Appendix B — New York Court of Appeals Denial of Leave to Appeal

Raphael P. Koenig, Esq.
475 Fifth Avenue
New York, New York 10017

Hon. Robert M. Morgenthau
District Attorney, New York Co.
155 Leonard Street
New York, New York 10013

Clerk, Court of Appeals

*Description of Order:

9-30-75 App. Div. 1st affmd. 4-2-74 Sup. Ct., N.Y. Co.